

75-1106

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1975

NATIONAL BANK OF NORTH AMERICA,  
*Petitioner,*  
*against*

ASSOCIATES OF OBSTETRICS AND FEMALE SURGERY, INC.,  
*Respondent,*  
*and*

APOLLO PRODUCTIONS, INC., GORDON I. HYDE and  
GARY B. WHETTON,  
*Defendants.*

**PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF UTAH**

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**STATEMENT**

In June of 1972, the Respondent commenced an action in the Salt Lake County District Court against the Petitioner, National Bank of North America, for damages arising out of a Loan Agreement entered into by the Petitioner with the Respondent in the State of Utah. The Petitioner is a National Banking Association, having its principal place of business in the Eastern District of New York City and was served at its principal place of business at 44 Wall Street, New York, New York on July 5, 1972.

The Respondent based its jurisdiction upon the fact that all parties to the lawsuit, with the exception of the National Bank of North America, were residents of the State of Utah and the cause of action arose in Utah. The Petitioner solicited the Respondent to invest money in a Utah corporation, Apollo Productions, Inc., and was responsible for the Respondent's involvement in the financial dealings, which are the subject matter of this action. In addition, the Petitioner under Utah

State law secured rights to assets owned by Apollo Productions, Inc., a Utah corporation, located within the State of Utah. The Petitioner also filed a petition in the United States District Court for the State of Utah to force Apollo Productions, Inc. into involuntary bankruptcy. In doing so, the Petitioner claimed a security interest in assets located within the State of Utah, and in effect used state laws to secure its position to the detriment of the Respondent and other investors.

On the 28th day of January, 1975, the Salt Lake County District Court with the Honorable Stuart M. Hansen, Jr. presiding, ruled in favor of the Respondent and denied the Petitioner's motion to dismiss. (Petitioner's brief pp. A. 5-A. 6.) The Petitioner's interlocutory appeal to the Utah Supreme Court was granted and the Court entered judgment on November 21, 1975 affirming the decision of the District Court. (Appellant's brief pp. A. 1-A. 4.)

The main thrust of both the Petitioner's and Respondent's briefs before the Utah District Court and the Utah Supreme Court was that the Petitioner had waived its rights under Title 12, U.S.C. Section 94, and that said Section did not apply because the transaction was local in nature. While the Appellant referred to *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), it did not direct its argument to the inter-relationships of 12 U.S.C. §94, 12 U.S.C. §24, and 28 U.S.C. §1348. Instead the cases cited above were used to establish the very general principle that a national bank must be sued in the district in which it maintains its principal place of business.

The Utah Supreme Court's decision turned entirely upon the inter-relationships of the federal statutes stated above. While the Court may have been aware of the main issues concerning the local nature of the action and the waiver on the part of the Petitioner, it did not discuss these issues nor render a decision as to them.

### REASONS FOR DENYING THE WRIT

The Petitioner's writ should be denied because of the action pending before the Utah District Court is local in nature and therefore the Federal Venue Provision of 12 U.S.C. §94 does not apply. In the case of *Casey v. Adams*, 102, U.S. 68, 26 L. Ed. 52 (1880), this Court in interpreting the provisions of the Bank Act which is now 12 U.S.C. §94, held that where the local law characterized a particular action as "local" rather than "transitory", the Federal Venue privilege did not apply and the suit could be properly brought against a national bank in a State court even if the bank was not established there. This Court has never pronounced guidelines to determine whether an action is "local" or "transitory". Therefore, the state courts have established a body of law concerning this issue.

In the case of *National Bank of Commerce v. State*, 368 P2d 997 (Okla 1962), the Oklahoma Supreme Court held that venue in the State District Court was proper in spite of the defendant National Bank's foreign citizenship. In so holding the Court said:

At p. 591, Sec. 820, 7 AmJur. "Banks," it is stated that these provisions (12 U.S.C. §94) 'do not deprive the state courts of jurisdiction of an action against a national bank located and doing business in another state, or in a county or city other than that in which the action is brought. The National Bank Act relates to transitory actions only and not to such actions as are by law local in their character, and national banks are not exempted from the ordinary rules of law affecting the liability of actions founded on local things.'

Thus in *Lone Star Producing Company v. Bird*, 406 S.W. 2d 344, (Texas 1966), the National Bank was required to defend a suit in a district other than where they were established or located, because the cause of action was deemed local rather than transitory, the court holding that *Casey v. Adams*, 102 U.S. 66, 26 L Ed 52 (1880) required only transitory actions to be brought where the bank was established. See also *Fresno National Bank v. Superior Court*, 83 Cal. 491, 24 P. 157 (1890) and *Continental National Bank v. Folsom*, 74 Ga. 449, 3 S.E. 269 (1887).

The action with which we are concerned is local in nature as indicated by the facts set forth in the Statement herein and therefore is not controlled by 12 U.S.C. §94.

It is also the contention of the Respondent that the Appellant waived its rights under 12 U.S.C. §94. The Appellant solicited financial backing from the Respondent, a Utah corporation for investment in another Utah corporation, Apollo Productions, Inc. The Appellant thereafter filed a petition of involuntary bankruptcy in the United States District Court for the District of Utah against the Apollo Productions, Inc. and claimed a secured position in relationship to the Respondent to the assets of said Apollo corporation, relying upon Utah State law to secure that position. It is a well-settled principle that the protection granted national banks by 12 U.S.C. §94 is a personal privilege which may be waived either expressly or constructively. *First National Bank v. Morgan*, 132, U.S. 141 (1889). The Respondent contends that the Petitioner waived its privilege based on the foregoing facts, and therefore the Utah District Court has jurisdiction to try the case pending before it.

It is the position of the Respondent that this Court should deny the Petitioner's Writ of Certiorari. In the event this Court does not deny said Writ, then the Respondent respectfully requests that the case be remanded to the Utah Supreme Court further proceedings to determine whether or not the action is local in nature and whether the Petitioner has waived its



privileges under 12 U.S.C. §94. This type of procedure was followed by this Court in the case of *Michigan National Bank v. Robertson*, 372 U.S. 591 (1963). In that case on a Petition for Writ of Certiorari this Court vacated the judgment below and referred the matter back to the state court for further proceedings to determine whether or not the Petitioner had waived the benefits of U.S.C. §94.

### CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied or remanded to the state court for determination of whether or not the action is local in nature and/or the Petitioner has waived its rights under 12 USC Sec. 94.

Respectfully submitted,

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